

**SOAH DOCKET NO. 582-09-2895  
TCEQ DOCKET NO. 2008-1305-MWD**

<b>IN THE MATTER OF THE</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>APPLICATION OF</b>	<b>§</b>	
<b>FARMERSVILLE INVESTORS, LP</b>	<b>§</b>	<b>OF</b>
<b>FOR A NEW TEXAS</b>	<b>§</b>	
<b>POLLUTANT DISCHARGE</b>	<b>§</b>	<b>ADMINISTRATIVE</b>
<b>ELIMINATION SYSTEM (TPDES)</b>	<b>§</b>	<b>HEARINGS</b>
<b>PERMIT NO. WQ0014778001</b>	<b>§</b>	

**EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS TO THE  
AMENDED PROPOSAL FOR DECISION**

---

**TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) files this, the Executive Director's Reply to the Amended Proposal for Decision (PFD).

**I. Procedural History**

The Farmersville application for a new permit was received on January 31, 2007 and declared administratively complete on February 23, 2007.<sup>1</sup> The Office of the Chief Clerk received five contested case hearing requests, which the Commission evaluated at its public meeting on February 11, 2009; the Commission referred the application to the State Office of Administrative Hearings (SOAH). A preliminary hearing was held on April 29, 2009 in Austin, Texas. The hearing on the merits (initial hearing) commenced on December 16, 2009 and concluded on December 17, 2009. On June 22, 2010 the TCEQ Commissioners issued an Interim Order remanding this case to SOAH solely for the purpose of reopening the record to allow

---

<sup>1</sup> Ex. ED-3 ("ED's Response to Comments").

the Administrative Law Judge (ALJ) to take evidence on four specific issues [*emphasis added*]. Specifically, the Commission directed the Administrative Law Judge (ALJ) to:

1. Take additional evidence on whether the outfall will discharge into an intermittent stream or directly into Lavon Lake;
2. Should the ALJ determine from the evidence that the outfall will discharge directly into Lavon Lake, take additional evidence as to whether the effluent limits in the Draft Permit will meet the requirements of 30 TAC ch. 307, and if not, take additional evidence as to what effluent limits are necessary to meet the requirements of 30 TAC ch. 307;
3. Upon an offer into evidence, consider the admission into the record of the final February 2010 Wastewater Feasibility Report; and
4. Make recommended Findings of Facts and Conclusions of Law to the Commission on the above evidentiary issues.<sup>2</sup>

Representatives of the Executive Director and the Office of Public Interest Counsel met with representatives of Farmersville and Mr. James Martin at the location of the proposed Farmersville outfall on July 16, 2010. From the outfall, the group followed the streambed down to the open water portion of Lavon Lake. Following the site visit the Executive Director requested additional information from Farmersville,<sup>3</sup> which it provided.<sup>4</sup>

A hearing on the remanded issues (remand hearing) was held November 29 – 30, 2010. The Administrative Law Judge (ALJ) issued the Amended PFD and Order on February 7, 2011. The ALJ noted that the Amended PFD addressed the issues from the initial hearing as well as the issues from the remand hearing. After

---

<sup>2</sup> TCEQ Interim Order issued June 22, 2010.

<sup>3</sup> Ex. App-17.

<sup>4</sup> Ex. App.-18.

evaluating the evidence from the hearings, the ALJ recommended that the Commission issue TPDES Permit No. WQ0014778001 without any additional terms or conditions. The Executive Director supports the ALJ's recommendation.

The Martins disagree and argue that the Farmersville Application should be denied. In their Exceptions to the ALJ's Amended PFD, the Martins reiterate many of the same arguments they have made in nearly all of their previous pleadings, going well beyond the scope of the referred issues. Specifically, the Martins state that the ALJ incorrectly analyzed the facts and law and argue that the Farmersville draft permit should be denied because: 1) Farmersville failed to meet its burden of proof; 2) the Commission should require regionalization; 3) the Farmersville application was incomplete; and 4) Farmersville and the Executive Director's determination of where the normal pool elevation of Lavon Lake crosses the unnamed tributary was wrong.<sup>5</sup> Additionally, the Martins assert that this case raises several issues that would set precedent including: 1) the role of the Executive Director in "fixing" applications; 2) the impact of flooding of upstream property caused by pooling of effluent; 3) the risk to public water supplies by redefining the contours of a lake; and 4) the proper interpretation of the Legislature's goals and requirements for regionalization.<sup>6</sup>

## **II. Discussion**

The Martins claim that the ALJ incorrectly analyzed the facts and the law, and thus, the Commission should deny the Farmersville application. The Martins make

---

<sup>5</sup> Protestants James A. and Shirley Martin's Exceptions to the Proposal for Decision, page 1.

<sup>6</sup> Protestants James A. and Shirley Martin's Exceptions to the Proposal for Decision, page 2.

several arguments in support of their position, but none of them are convincing and they only address one of the referred issues. According to TCEQ's rules, "[W]hen a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues."<sup>7</sup> The Executive Director's Reply, therefore, only addresses Martin issue four which corresponds to Commission issue one.

According to the Texas Government Code and TCEQ's rules, during a hearing on the merits, the ALJ may consider an issue that was not referred by the Commission if the ALJ determines the issue is material, supported by the evidence and there is a good reason the issue was not raised during the comment period.<sup>8</sup> During both hearings, the Martins repeatedly attempted to expand the issues beyond the issues referred by the Commission. The new issues raised by the Martins were not supported by the evidence, nor did the Martins explain why the issues were not raised during the comment period, thus, the ALJ correctly limited the scope of the hearing to the issues referred by the Commission in its Interim Order.<sup>9</sup>

*A. The discharge route is correctly characterized as from the Outfall to an intermittent stream then to the Elm Creek Arm of Lavon Lake in Segment 0821 of the Trinity River Basin.*

The ALJ was correct in her discussion of the discharge route and in Finding of Fact 25. After evaluating all the evidence presented, the ALJ found that Lavon Lake

---

<sup>7</sup> 30 TEX. ADMIN. CODE § 80.6.

<sup>8</sup> TEX. GOVT. CODE § 2003.047 and 30 TEX. ADMIN. CODE § 80.4.

<sup>9</sup> See, Remand Hr'g Tr. Vol. 1 167:3-6 "And I think in my PFD I specifically found that the outfall is not part of the facility; and as has been pointed, the TCEQ Commissioners did not ask us to revisit that."; Hr'g Tr. Vol 1. 169:23-24 "And that's not been remanded to us. We're going to stay within the parameters of the remand."

does not reach up the intermittent stream to the location of the proposed outfall<sup>10</sup> and that the physical composition of the high point in the intermittent stream is not relevant.<sup>11</sup> The ALJ relied on the testimony of three experts: Mr. David McCullah, a registered professional surveyor, and Dr. Paul Jonathan Young who both testified on behalf of Farmersville; and Mr. James Michalk who testified on behalf of the Executive Director. The Martins did not offer a single expert to support their position, rather they attempted to prove their points through cross examination of the expert witnesses for Farmersville and the Executive Director and the testimony of Mr. Martin, a lay witness. As evidenced by the ALJ's findings, the Martins' attempts were unsuccessful. All three experts testified that the Farmersville discharge would be into an intermittent stream then into Lavon Lake.<sup>12</sup> The only testimony to the contrary was the unsupported lay testimony of Mr. Martin.

The Martins disagree with the ALJ's decision because, according to them, Lavon Lake does not extend up the intermittent tributary to the location of the proposed outfall because there has been a change to the physical characteristics of the intermittent stream. According to the Martins, when the US Army Corps of Engineers (COE) raised the normal pool elevation of Lavon Lake the COE intended a cove to extend to the location of the proposed Farmersville outfall.<sup>13</sup> The Martins' assertion that Farmersville will discharge to a "cove" that was historically part of

---

<sup>10</sup> Amended Proposal for Decision, pages 14-15.

<sup>11</sup> Amended Proposal for Decision, page 16.

<sup>12</sup> See, Mr. Michalk Hr'g Tr. Vol. 2, 299:23-25; 314:12-19; 319:11-13; Hr'g Tr. Vol. 2, 321:21-25; Mr. McCullah, Hr'g Tr. Vol. 1, 23:23-24; Dr. Young, Hr'g Tr. Vol. 1, 149:9-10, Hr'g Tr. Vol. 1, 190:10-15.

<sup>13</sup> Protestants James A. and Shirley Martin's Exceptions to the Proposal for Decision, page 13.

Lavon Lake and that the COE intended Lavon Lake to extend to the proposed outfall location is not supported by the evidence.

1. There is no evidence in the record that the intermittent stream was ever a cove of Lavon Lake.

During the remand hearing, Mr. Michalk, the Executive Director's modeling expert, was asked a hypothetical question about effluent limits for discharges into coves versus effluent limits for discharges into intermittent streams;<sup>14</sup> however, the concept that the intermittent stream was at one point a "cove" is a new concept which was first inserted in the Martins' closing argument on remand, without any supporting evidence in the record. The Martins did not offer any expert testimony that the intermittent stream was ever a cove. The Martins are impermissibly going outside the record by referring to the intermittent stream as a cove.<sup>15</sup> The Executive Director respectfully recommends that the Commission disregard all the Martins arguments that the intermittent stream was ever a cove as well as all arguments that rely on the intermittent stream being a cove.

2. The Executive Director evaluated the discharge route and determined that the Farmersville discharge would be to an intermittent stream thence to the Elm Creek Arm of Lavon Lake in Segment 0821 of the Trinity River Basin.

At the initial hearing, Mr. James Michalk, the Executive Director's dissolved oxygen (DO) modeling expert, testified that under normal pool elevation conditions, the creek runs to an open cove before it becomes part of Lavon Lake.<sup>16</sup> To reach this conclusion, Mr. Michalk testified he reviewed a USGS topographic map, aerial

---

<sup>14</sup> Remand Hr'g Tr. Vol. 2, 372-373:4-13.

<sup>15</sup> TEX. R. CIV. P. 269(e), "Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel."

<sup>16</sup> Ex. ED-14 12:20-21 (Prefiled Testimony of James E. Michalk).

imagery and a map from the North Central Texas Council of Governments' website.<sup>17</sup> At the remand hearing, Mr. Michalk testified that after reviewing the additional information in Farmersville's response to the Executive Director's Request for Information, and after considering the evidence presented at the remand hearing, his opinion had not changed – the discharge from the Farmersville wastewater treatment plant will be into an intermittent stream then into Lavon Lake.<sup>18</sup>

The Martins make much ado over the fact that Mr. Michalk based his recommendations on the best information available to him, rather than relying on maps that do not provide detailed elevation contours, descriptions of the streams, or keys.<sup>19</sup> It would be absurd for an expert in water quality modeling to rely on either a project map or a highway map when he has a United States Geological Survey (USGS) topographic map available. As Mr. Michalk testified, each type of map introduced has its uses, but for his determination of the characteristics of a discharge route, he opted to use the USGS map because it has the most precise data regarding the characteristics of the stream in question.<sup>20</sup>

The Martins also assert that both surveys performed by Farmersville show that the location of the proposed Outfall is below the normal pool elevation of Lavon Lake, and therefore, the Outfall must be part of the Lavon Lake. The Martins are mistaken. Farmersville conducted a detailed on-site survey of the proposed discharge route. The data from Farmersville's survey was depicted on maps and a stream profile which

---

<sup>17</sup>*Id.* 12:13-17.

<sup>18</sup>Remand Hr'g Tr. Vol 2 299:23-25; 314:12-19; 319:11-13; Hr'g Tr. Vol. 2, 321:21-25.

<sup>19</sup> Protestants James A. and Shirley Martin's Exceptions to the Proposal for Decision, page 5-6 and Martins' Closing Argument on Remand, pgs 16-17.

<sup>20</sup> Remand Hr'g Tr. Vol. 2, 328:11-18.

were reviewed by Mr. Michalk.<sup>21</sup> The survey data indicates that the elevation of the thalweg (flowline) of the channel at the outfall location is 492.15 feet above mean sea level (amsl) which is higher than the normal pool elevation of Lavon Lake (492 feet amsl).<sup>22</sup> From the outfall location the thalweg varies from 492.17 feet amsl to a low point of approximately 490.5 feet amsl to a high point of approximately 493 feet amsl.<sup>23</sup> The streambed is above 492 feet amsl for over 300 feet.<sup>24</sup> Mr. Michalk testified that after reviewing the stream profile he determined that the elevated area above the 492-foot line effectively separates the outfall vicinity of the unnamed tributary from the classified segment of Lavon Lake.<sup>25</sup> In cases where the discharge location and any low-lying portions of the streambed are physically separated from the main body of the lake at normal pool elevation by an extended area of higher elevation, as is clearly the case here as demonstrated by the survey data, the relative elevations of low points along the streambed are irrelevant in determining the upstream extent of the lake at normal pool elevation.

3. The physical composition of the elevated area along the discharge route is not relevant.

The Martins assert that the elevated area along the discharge route is possibly near the location of the old road; the buildup is caused by the buildup of sediment, tree limbs and trash which has changed the flow path; and the “buildup” could be

---

<sup>21</sup> Remand Hr’g Tr. Vol. 2, 299:5-25.

<sup>22</sup> Ex. App.-18.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Remand Hr’g Tr. Vol. 2, 299:5-19.



removed at anytime causing Farmersville to discharge directly into Lavon Lake.<sup>26</sup>

There is no evidence in the record to support any of these claims.

i. The location of the old road is not material to the Executive Director's determination that the proposed discharge would be first to an intermittent stream. Mr. McCullah, the surveyor who testified on behalf of Farmersville testified that during his survey of the intermittent stream, he did not find a relic culvert that might indicate an old road bed.<sup>27</sup> Mr. Michalk testified repeatedly that he looked for evidence of the old road bed on aerial images and during his site visit in August 2010.<sup>28</sup> Moreover, Mr. Michalk testified, the composition of the elevated portion of the intermittent stream does not make any difference in his analysis.<sup>29</sup>

ii. The physical composition of the elevation portion of the discharge route is not relevant to the determination that the discharge route is an intermittent stream. The Martins did not offer any expert testimony regarding the composition of the elevated area, nor did the testimony elicited from witnesses for Farmersville or the Executive Director support the Martins' position. Moreover, as Mr. Michalk testified, the composition of the high point does not make any difference in his analysis.<sup>30</sup>

iii. The evidence does not support the Martins contention that the elevated section of the intermittent stream could be removed at anytime. The Martins expound that North Texas Municipal Water District (NTMWD) and other lake

---

<sup>26</sup> Protestants James A. and Shirley Martin's Exceptions to the Proposal for Decision, pages 14-15.

<sup>27</sup> Remand Hr'g Tr. Vol. 1 122:20-123:10.

<sup>28</sup> Remand Hr'g Tr. Vol 2, 337:10-23; 340:8-15; 374:17-23; 376:9-19; 378:9-12; 38:18-383:5; and 463:1-3.

<sup>29</sup> Remand Hr'g Tr. Vol. 2 424:17-21.

<sup>30</sup> Remand Hr'g Tr. Vol. 2 424:17-21.

owners must be able to “remove blockages to restore their lakes ability to function . . .”<sup>31</sup> The Martins, however, did not offer any evidence to support their position. The Martins did not offer an expert from either the COE or NTMWD to testify that either entity would remove a blockage of the type the Martins assert cause the elevated portion of the intermittent stream. In fact, the Martins did not offer any credible evidence that Lavon Lake has been redefined in any way since the normal (conservation) pool level of the lake was raised.

In sum, the Martins did not offer any evidence to support their theories that the elevated area is possibly near the location of the old road; the buildup is caused by the buildup of sediment, tree limbs and trash which has changed the flow path; the “buildup” keeps Lavon Lake from reaching the outfall; and the “buildup” could be removed at anytime causing Farmersville to discharge directly into Lavon Lake.

*B. The Martins’ Proposed Findings of Fact and Conclusions of Law.*

The Martins propose new Findings of Fact and Conclusion of Law on seven issues, only one of which was included in the Commission’s Interim Order. The Executive Director respectfully recommends that the Commission reject all of the Martins Findings of Fact and Conclusions of Law and adopt the Findings of Fact and Conclusions of Law proposed by the ALJ with the minor changes recommended by the Executive Director in his Exceptions to the PFD.

### **III. Conclusion**

The Executive Director concludes that Farmersville has satisfied all applicable statutory and regulatory requirements in its application for TPDES Permit No.

---

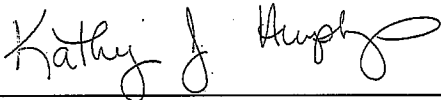
<sup>31</sup>Protestants James A. and Shirley Martin’s Exceptions to the Proposal for Decision, page 15.

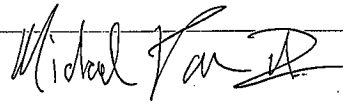
WQ0014778001, and that Draft TPDES Permit No. WQ0014778001 meets all applicable statutory and regulatory requirements and can be issued without any additional provisions. Additionally, the Executive Director recommends that the Commission reject all of the Martins' Findings of Fact and Conclusions of Law and adopt the Findings of Fact and Conclusions of Law proposed by the ALJ with the minor changes recommended by the Executive Director in his Exceptions to the PFD.

Respectfully submitted,  
Texas Commission on Environmental  
Quality

Mark R. Vickery, P.G.  
Executive Director

Robert Martinez, Director  
Environmental Law Division

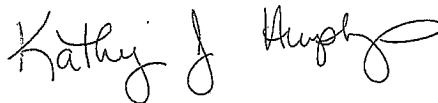
By   
Kathy J. Humphreys, Staff Attorney  
Environmental Law Division  
State Bar No. 24006911  
P.O. Box 13087, MC 173  
Austin, Texas 78711-3087  
(512) 239-3417  
REPRESENTING THE EXECUTIVE  
DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY

By   
Michael Parr, Staff Attorney  
Environmental Law Division  
State Bar No. 24058069  
P.O. Box 13087, MC 173  
Austin, Texas 78711-3087  
(512) 239-0969

REPRESENTING THE EXECUTIVE  
DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY

**CERTIFICATE OF SERVICE**

I certify that on March 10, 2011, a copy of the foregoing Executive Director's Reply to Exceptions on Remand was filed with the Office of the Chief Clerk and sent by first class, agency mail or facsimile to the persons listed in the mailing list below.



---

Kathy J. Humphreys, Staff Attorney  
Environmental Law Division

**MAILING LIST**  
**FARMERSVILLE INVESTORS, L.P.**  
**SOAH DOCKET NO. 582-09-2895**  
**TCEQ DOCKET NO. 2008-1305-MWD**

The Honorable Sharon Cloninger  
Administrative Law Judge  
State Office of Administrative  
Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025  
Tel: (512) 475-4993  
Fax: (512) 322-2061

Ms. LaDonna Castañuela  
Texas Commission on  
Environmental Quality  
Office of Chief Clerk, MC 105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

Rick Lowerre  
Lowerre, Frederick, Perales, Allmon  
& Rockwell  
707 Rio Grande, Suite 200  
Austin, Texas 78701  
Tel: (512) 469-6000  
Fax: (512) 482-9346

John R. Moore  
Lloyd Gosselink Blevins Rochelle &  
Townsend P.C.  
816 Congress Ave., Ste. 1900  
Austin, Texas 78701-2442  
Tel: (512) 322-5810  
Fax: (512) 472-0532

Amy Swanholm  
Texas Commission on  
Environmental Quality  
Public Interest Counsel MC 108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-6823  
Fax: (512) 239-6377